A

Pengurusan Danaharta Nasional Bhd v Yong Wan Hoi & Anor (No 2)

B HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S6–22–504 OF 2004 (NO 2)
ABDUL MALIK ISHAK J
30 NOVEMBER 2007

C *Civil Procedure — Affidavits — Affidavit in reply — Filed beyond 14 days from the date of service of the plaintiff's application — Whether admissible*

D *Civil Procedure — Writ of summons — Writ of possession — Application for leave to issue writ of possession — Service of the cause papers on the defendants' solicitors — Whether personal service required on all the occupiers — Rules of the High Court 1980 O 45 r 7(4), Form 87*

E

This was the plaintiff's application for leave to issue a writ of possession against the defendants (encl 21). The plaintiff deposed in its affidavit that it obtained an order from this court against the first and the second defendants for vacant possession of the property. It was further deposed that on 14 April F 2006 the plaintiff's solicitors caused a copy of the order to be personally served on the first and the second defendants. On 29 August 2006, the defendants purported to file an affidavit to oppose the application. The plaintiff objected to the admissibility of the defendants' affidavit because it was out of time in that it was filed well beyond 14 days from the date of G service of the plaintiff's application in encl 21 and the plaintiff's affidavit in reply in encl 20 (O 32 r 13(2)(b) of the Rules of the High Court 1980 ('RHC')). A copy of the sealed application in encl 21 was served on the defendants' solicitors on 25 July 2006. The plaintiff's affidavit in support was served on the same solicitors on 5 June 2006 together with the unsealed copy H of the plaintiff's application in encl 21. The objection advanced by the defendants was that the order for vacant possession dated 23 March 2006 was not served on the defendants personally. That the plaintiff's application for leave to issue a writ of possession was subject to the rules of procedure for committal proceedings, namely, O 45 rr 5 and 7 of the RHC and not those I of applications for leave to issue writs of possession under O 45 r 3(3) of the RHC. It was also argued that the plaintiff's application for leave to issue a writ of possession was not subject to the rules of procedure for committal proceedings but to O 45 r 3(3) of the RHC, which provision it was alleged, required personal service on all the occupiers.

Held:

(1) It was trite law that service of the cause papers on the defendants' solicitors would constitute a proper service on all the defendants because the solicitors were held out in the defendant's memorandum of appearance as being the proper party for service of the documents on the defendants. This was clearly set out in the RHC. There was no necessity for the plaintiff to serve the cause papers of the application for leave to issue a writ of possession on the defendants personally or at their residential address. The fact that the plaintiff did so in this case merely showed an abundance of caution and an act of diligence and it in no way negate the effect of due service of the cause papers on the defendants' solicitors. The defendants' first affidavit was out of time and ought not to be considered in these proceedings (see paras 6–9).

(2) The plaintiff here was not commencing committal proceedings but rather proceedings for the issue of the writ of possession which was governed by an entirely different provision and that would be O 45 r 3 of the RHC. The penal notice in the order for vacant possession was included for the sole purpose of satisfying O 45 r 7(4) of the RHC in the event the plaintiff wished to enforce the order for vacant possession by way of committal proceedings. The service copy of the judgment or order must contain the requisite notice in Form 87 (see paras 30, 32(v)).

(3) The correct position of the law was that the plaintiff must show that notice had been given to all the occupiers who were not defendants to the action for vacant possession. This was consonant with the legal position adopted in the cases of *Chu Ah Falt v Abdullah Abdul Majid* [1998] 5 MLJ 446 and *Lim Kok Liam & Sons Sdn Bhd v Lau Choon Wan t/a Restoran Paramount Garden and third party* [1996] MLJU 312 that once the defendants to the original proceedings for vacant possession had been shown to have had notice of those proceedings or any order thereunder, they were deemed to have 'notice of the proceedings' within the meaning of O 45 r 3(3) of the RHC. Subsequently, for the application to issue a writ of possession, the plaintiff needed only to show that it had given notice to any other occupier of the said property in question who was not a defendant to the original proceedings. In the present case, all the occupiers were defendants to the action (see paras 43–44).

(4) The rules of the High Court were unerringly definite in regard to the issue of service. An application for leave to issue a writ of possession did not require personal service because it was not expressly stated (see O 62 r 1(1) of the RHC). All permutations of the penal notice in the order for vacant possession would not make it any more than what it was —

a mandatory requirement pursuant to O 45 r 7(4) of the RHC in the event the plaintiff wished to enforce it by way of committal proceedings (see para 63)

[Bahasa Malaysia summary

Ini adalah permohonan plaintif untuk kebenaran mengeluarkan writ pemilikan terhadap defendan-defendan (kand 21). Plaintif menyatakan di dalam afidavitnya bahawa ia telah memperolehi satu perintah daripada mahkamah terhadap defendan pertama dan kedua untuk milikan kosong hartanah tersebut. Seterusnya ia juga dinyatakan bahawa pada 14 April 2006 peguamcara plaintif telah menyebabkan satu salinan perintah tersebut disampaikan secara kediri kepada defendan pertama dan kedua. Pada 29 Ogos 2006, defendan-defendan telah memfailkan satu afidavit membangkang permohonan tersebut. Plaintif membantah penerimaan afidavit defendan tersebut oleh kerana ia di luar masa iaitu difailkan melebihi 14 hari dari tarikh penyampaian permohonan plaintif di kandungan 21 dan afidavit jawapan plaintif di kandungan 20 (A 32 k 13(2)(b) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT')). Sesalinan meterai permohonan tesebut di kandungan 21 disampaikan kepada peguamcara defendan pada 25 Julai 2006. Afidavit sokongan plaintif disampaikan kepada peguamcara yang sama pada 5 Jun 2006 bersama sesalinan permohonan plaintif yang tidak dimeteraikan di kandungan 21. Bantahan yang diberikan oleh defendan-defendan ialah bahawa perintah untuk milikan kosong bertarikh 23 Mac 2006 tidak disampaikan kepada defendan-defedan secara kediri. Permohonan plaintif untuk kebenaran mengeluarkan writ milikan adalah tertakluk kepada peraturan-peraturan prosedur untuk prosiding komital, iaitu, A 45 kk 5 dan 7 KMT dan bukannya permohonan-permohonan untuk kebenaran mengeluarkan writ pemilikan di bawah A 45 k 3(3) KMT. Ia juga dihujahkan bahawa permohonan plaintif untuk kebenaran mengeluarkan writ pemilikan tidak tertakluk kepada peraturan-peraturan prosedur untuk prosiding komital tetapi kepada A 45 k 3(3) KMT, dimana peruntukkan tersebut dikatakan, memerlukan penyampaian ke diri kesemua penghuni-penghuni.

Diputuskan:

(1) Ia adalah undang-undang mantap bahwa penyampaian kertas-kertas kausa kepada peguamcara defendan-defendan membentuk penyampaian sempurna terhadap kesemua defendan-defendan oleh kerana peguamcara dinyatakan di memorandum kehadiran defendan-defendan sebagai pihak yang betul untuk penyampaian dokumen-dokumen terhadap defendan-defendan. Ini adalah jelas dinyatakan di KMT. Tiada keperluan untuk plaintif untuk

menyampaikan suratcara-suratcara permohonan untuk kebenaran mengeluarkan writ milikan kepada defendan-defendan secara Kediri ataupun di tempat tinggal mereka. Fakta bahawa plaintif telah berbuat demikian di dalam kes ini hanya menunjukkan sikap berhati-hati mereka dan satu tindakan ketekunan dan tidak sama sekali menafikan kesan penyampaian wajar kertas-kertas kausa kepada peguamcara defendan. Afidavit defendan pertama adalah di luar masa dan tidak sepatutnya dipertimbangkan di dalam prosiding ini (perenggan 6–9).

(2) Plaintif di sini bukannya memulakan prosiding komital tetapi prosiding-prosiding untuk pengeluaran writ milikan yang dikawal oleh satu peruntukkan yang berlainan iaitu A 45 k 3 KMT. Notis penal di dalam perintah untuk milikan kosong dimasukkan hanya untuk tujuan memenuhi A 45 k 7(4) KMT sekiranya plaintif ingin menguatkuasakan perintah tersebut untuk milikan kosong melalui prosiding komital. Penyampaian sesalinan penghakiman atau perintah harus mengandungi notis tersebut di Borang 87 (perenggan 30, 32(v)).

(3) Pendirian yang betul undang-undang ialah bahawa plaintif harus menunjukkan bahawa notis telah diberikan kepada kesemua penghuni-penghuni yang bukannya defendan-defendan kepada tindakan untuk milikan kosong. Ini adalah selaras dengan kedudukan undang-undang yang dipakai di dalam kes-kes *Chu Ah Falt v Abdullah Abdul Majid* [1998] 5 MLJ 446 dan *Lim Kok Liam & Sons Sdn Bhd v Lau Choon Wan t/a Restoran Paramount Garden and third party* [1996] MLJU 312 bahawa apabila defendan-defendan kepada prosiding asal untuk milikan kosong telah ditunjukkan bahawa mereka mempunyai notis prosiding-prosiding atau sebarang perintah dibawahnya, mereka dianggap mempunyai 'notis terhadap prosiding-prosiding tersebut' dalam maksud A 45 k 3(3) KMT. Selanjutnya, untuk permohonan mengeluarkan writ milikan, plaintif hanya perlu menunjukkan bahawa ia telah member notis kepada sebarang penghuni lain hartanah tersebut yang bukan seorang defendan kepada prosiding-prosiding asal tersebut. Dalam kes ini, kesemua penghuni-penghuni adalah defendan-defendan kepada tindakan ini (lihat perenggan 43–44).

(4) Kaedah-kaedah mahkamah tinggi amat jelas berhubungan dengan isu penyampaian. Satu permohonan untuk kebenaran mengeluarkan writ milikan tidak memerlukan penyampaian kediri oleh kerana ia tidak dinyatakan dengan khusus (lihat A 62 k 1(1) KMT). Segala nyataan di notis penal di dalam perintah untuk milikan kosong tidak akan menjadikan sesuatu yang lebih daripada apa yang sebenarnya — satu keperluan mandatory menurut A 45 k 7(4) KMT sekiranya plaintif ingin menguatkuasakannya melalui prosiding-prosiding komital (lihat perenggan 63).]

Notes

For a case on writ of possession, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) para 8156.

For cases on affidavit in reply, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 319–330.

Cases referred to

Adams v London Improved Motor Cars Bureau Ltd [1921] 1 KB 495 (refd)

Affin Bank Bhd v Tan Sri Kishu Tirathrai [2004] MLJU 246 (refd)

Arumugam v Suppiah Chettliar [1935] MLJ 4 (not folld)

Asia Commercial Finance (M) Bhd v Pasadena Properties Development [1991] 1 MLJ 111 (refd)

Avory v Andrews [1882] 51 LJ Ch 414 (refd)

Bell v Tuohy [2002] 3 All ER 975 (refd)

Blyth v Fladgate [1891] 1 Ch 337 (refd)

Bracey, Re [1845] 8 Beav 266 (refd)

Bryant, Re [1877] 4 Ch D 98 (refd)

Cartier International v Lee Hock Lee [1993] 1 SLR 616 (refd)

Chu Ah Falt v Abdullah Abdul Majid [1998] 5 MLJ 446 (folld)

Datuk Jagindar Singh v Tara Rajaratnam [1983] 2 MLJ 196 (refd)

Emmens v Elderton [1853] 4 HLC 624 (refd)

Gamlen Chemical Co (UK) Ltd v Rochem Ltd [1980] 1 All ER 1049 (refd)

General (Rtd) Tan Sri Hashim Mohd Ali & Anor v Francis s/o MG Mirandah [2000] MLJU 436 (refd)

Goddard v Carlisle [1821] 9 Pri 169 (refd)

Governor And Company of the Bank of England, The v Vagliano Brothers [1891] AC 107 (refd)

Gray, Re [1869] 20 LT 730 (refd)

Griffiths v Evans [1953] 1 WLR 1424 (refd)

Hampden v Wallis [1884] 26 Ch D 746 (not folld)

Hill Samuel & Co Ltd v Littaur The Times 13 April 1985 (refd)

Husson v Husson [1962] 1 WLR 1434 (refd)

Leong Ah Weng v Neo Thean Soo & Anor [1983] 2 MLJ 119 (refd)

Leow Seng Heat v Low Mui Yein [1996] 5 MLJ 381 (refd)

Lim Kok Liam & Sons Sdn Bhd v Lau Choon Wan t/a Restoran Paramount Garden and third party [1996] MLJU 312 (folld)

Malayan Banking Bhd v Zahari bin Ahmad [1988] 2 MLJ 135 (refd)

Manchester Corp v Connolly [1970] Ch 420; [1970] 1 All ER 961 (refd)

Mason v Grigg [1909] 2 KB 341 (refd)

MBf Holdings Bhd & Anor v Houng Hai Kong & Ors [1993] 2 MLJ 516 (refd)

Ng Hee Thoong & Anor v Public Bank Berhad [1995] 1 MLJ 281 (refd)

OCBC Bank (Malaysia) Bhd v Unimasco Sdn Bhd & Ors [2004] MLJU 194 (refd)

Oswald Hickson Collier & Co v Carter-Ruck [1984] All ER 5 (refd)

Paine, Re [1912] 28 TLR 201 (refd)
Pengurusan Danaharta Nasional Berhad v Yong Wai Hoi & Anor [2007] 6 MLJ 709 (refd)
Pearce v Pearce [1959] CLY para 1451 (refd)
Pinner v Knights [1843] 6 Beav 174 (refd)
Pinley v Bagnall [1723] 3 Doug KB 155 (refd)
Seraglio, The [1885] 10 PD 120 (refd)
Stephen Chang Holding Sdn Bhd v Goh & Associates [1989] 3 MLJ 497 (refd)
Taman Zahari Zabidi Sdn Bhd v Adnan Sundra & Low [1999] 1 MLJ 424 (refd)
Vanda, The [1960] MLJ 283 (not folld)
Watson, Re [1886] 18 QBD 116; [1887] 19 QBD 234 (refd)
Wee Choo Keong v MBf Holdings Bhd & Anor And Another Appeal [1993] 2 MLJ 217 (refd)
William Jacks & Co (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Anor [1994] 3 MLJ 40 (refd)
Yukilon Manufacturing Sdn Bhd v Dato' Wong Gek Meng (No 2) [1998] 5 MLJ 1 (refd)
Z v A-Z & AA-LL [1982] QB 558 (refd)

Legislation referred to
Civil Procedure Code s 560
Legal Profession Act 1976 ss 114, 116
Rules of the High Court 1980 O 1 r 4(2), O 1A, O 2, O 3 r 5, O 10 rr 1, 5, O O 11 rule 3, 12 r 2(3), O 15 rr 3, 7, 8, O 16 rule 3(3)(a), O 20 r 1(2), O 24 rule 16, O 26 r 7, O 32 r 13(2)(b), O 41 r 5, O 42 rr 2, 13, O 44 r 3(2), O 45 r 3, O 45 r 5, O 45 r 7, O 52 r 3, O 62 r 1, O 77 rule 5(4), O 83, Form 87, Form 90

Mahaletchumi Balakrishnan (Skrine) for the plaintiff.
Surendran Subramaniam (Suren & Ragu) for the defendants.

Abdul Malik Ishak J (now JCA):

INTRODUCTION

[1] This is the plaintiff's application for leave to issue a writ of possession against the defendants as seen in encl 21. It is a sequel to the first case which has since been reported in three popular local law journals, namely:

(a) *Pengurusan Danaharta Nasional Berhad v Yong Wai Hoi & Anor* [2007] 6 MLJ 709;

(b) *Pengurusan Danaharta Nasional Berhad v Yong Wai Hoi & Anor* [2007] 5 AMR 584; and

A (c) *Pengurusan Danaharta Nasional Berhad v Yong Wai Hoi & Ors* [2007] 9 CLJ 416;

[2] Enclosure 21 is worded in this way:

B LET ALL PARTIES concerned attend before the Judge/Senior Assistant Registrar in Chambers on the 1 September 2006 at 9am on the hearing of an application of the Plaintiff named above for an Order that the Plaintiff be given leave to issue a Writ of Possession against the First and (the) Second Defendants on the Order herein dated the 23 March, 2006 pursuant to O 45 r 3 of the Rules of the High C Court, 1980 and that the costs of and costs occasioned by this application be paid by the First and (the) Second Defendants. The grounds for this application are as stated in the Affidavit of ADINAN BIN MANING that is filed herein.

D **[3]** And encl 21 is supported by an affidavit affirmed by Adinan bin Maning on 2 June 2006 as seen in encl 20. The deponent of the affidavit in encl 20 deposes that on 23 March 2006, the plaintiff obtained an order from this court against the first and the second defendants for vacant possession of the property held under the HS(D) 82855 (formerly QT(R) 15215) PT15162, Mukim of Kuala Lumpur, District of Kuala Lumpur, Federal E Territory also known as no: 6, Lorong Bukit Pantai 4, Taman Bukit Pantai, 59100 Kuala Lumpur (hereinafter referred to as 'the said property'). It is further deposed that on 14 April 2006 the plaintiff's solicitors Messrs Skrine caused a copy of the order to be personally served on the first and the second defendants. The affidavit of service affirmed by M. Jegatheswaran a/l F Maheswaran on 25 May 2006 has been filed and exhibited as 'A–2' to the affidavit in encl 20. The affidavit of service is in encl 23.

[4] On 29 August 2006, the defendants purported to file an affidavit to G oppose the application in encl 21 and that affidavit is styled as an 'affidavit in reply (1)' and it can be seen in encl 27. The plaintiff objects to the admissibility of the defendants' affidavit in encl 27 because it is out of time in that it was filed well beyond 14 days from the date of service of the plaintiff's application in encl 21 and the plaintiff's affidavit in reply in encl 20 H (O 32 r 13(2)(b) of the Rules of the High Court 1980 ('RHC')).

INADMISSIBILITY OF THE DEFENDANTS' AFFIDAVIT AFFIRMED ON 29 AUGUST 2006 AS SEEN IN ENCL 27

I **[5]** Now, a copy of the sealed application in encl 21 was served on the defendants' solicitors Messrs Suren & Ragu on 25 July 2006. The plaintiff's affidavit in support in encl 20 was served on the same solicitors on 5 June 2006 together with the unsealed copy of the plaintiff's application in encl 21. All these are averred in the affidavit of service in encl 23 at paras 2 and 3.

From this brief chronology, the defendants ought to have filed and served an affidavit in opposition on 8 August 2006.

[6] It is the trite law that service of the cause papers on the defendants' solicitors would constitute a proper service on all the defendants because the solicitors are held out in the defendant's memorandum of appearance as being the proper party for service of the documents on the defendants. This is clearly set out in the RHC and I will now demonstrate it:

(a) Order 12 r 2(3) of the RHC states that a memorandum of appearance must specify the business address of the defendant's solicitor, in the case of a defendant appearing by a solicitor, and that address is the address of service for the defendant. Thus, the memorandum of appearance and the copy thereof must be signed by the solicitor who must also state his place of business which will be the address for service (see for elucidation the *Malaysian High Court Practice* (2001 desk Ed) at pp 185 to 189).

(b) An application for leave to issue a writ of possession does not require personal service under the RHC. This is clear from a reading of O 45 r 3 of the RHC which states that 'notice of the proceedings' must be given to the defendants and not that the defendants must be personally served with any cause paper. It is correct to say that leave to issue a writ of possession must first be obtained and this would apply to all cases except for charge actions where O 83 of the RHC would apply. It must be borne in mind that leave will only be given to enforce a final judgment or order for possession and not on an interlocutory motion or summons (*Manchester Corp v Connolly* [1970] Ch 420; [1970] 1 All ER 961, CA; and *Leong Ah Weng v Neoh Thean Soo & Anor* [1983] 2 MLJ 119). I must reiterate that leave to issue a writ of possession is necessary except in actions concerning charges under O 83 of the RHC. In fact, Mohamed Dzaiddin J (as he then was) in *Malayan Banking Bhd v Zahari bin Ahmad* [1988] 2 MLJ 135 was of the view that an order for possession sought by an equitable chargee should be made under O 83 of the RHC. It is salutary to remember that the necessity for leave in cases which do not fall within the range of O 83 of the RHC is simply meant to give sufficient notice of the proceedings to any party who may have actual possession of the immovable property in question. It is also salutary to note that the application for leave may be made ex parte to one or more of the judges of the High Court or the Registrar (see O 45 r 3(3) of the RHC to be read with O 1 r 4(2) of the RHC) supported by an affidavit which should give the particulars of any sub-letting or actual possession by other occupiers and the requisite notice given to them of the proceedings. If these are done, it would enable the court to determine whether r 3(3) of O 45 of the RHC has been complied with.

(c) Order 62 r 1 of the RHC makes it clearer in that only the documents which are expressly required by the rules to be served personally must be so served. But, it must be emphasised that the court has the power to dispense with the requirement for personal service (see O 62 r 1(1) and r 1(2) of the RHC). What, may one ask, would be the documents that require personal service? The answer is found in the RHC. I shall now categorise them in bold bullet forms:

- By way of a writ of summons (O 10 r 1 of the RHC).
- An amended writ of summons without leave and before service unless the court otherwise directs (O 20 r 1(2) of the RHC).
- A notice of writ of summons for service out of jurisdiction (O 11 r 3 of the RHC and O 10 r 1 of the RHC).
- A third party notice to a person who is not a party to the action (O 16 r 3(3)(a) of the RHC).
- The defence and counterclaim against a person who is not a party to the action (O 15 r 3 of the RHC).
- The originating summons (O 10 r 5 of the RHC).
- The originating notice of motion (O 10 r 5 of the RHC).
- The originating petition (O 10 r 5 of the RHC).
- The notice of the judgment or order unless the court directs otherwise (O 44 r 3(2) of the RHC).
- An order to carry on with the proceedings to be served on a person who is not already a party thereto (O 15 rr 7 and 8 of the RHC).
- The summons for leave to issue execution against a person under a judgment against a particular firm (O 77 r 5(4) of the RHC).
- An order to do an act (unless it is an order for discovery or inspection of documents (O 24 r 16 of the RHC)), or for interrogatories under O 26 r 7 of the RHC if it is intended to be enforced by way of a committal (O 45 r 7 of the RHC).
- And, finally, a notice of motion for committal in cases where O 52 r 3(3) of the RHC applies unless, of course, the court dispenses with such service (O 52 r 3(4) of the RHC).

[7] I must categorically state that neither the order for vacant possession nor the cause papers for leave to issue a writ of possession need be served on the defendants personally in order to file an application under O 45 r 3(1)(a) of the RHC.

[8] Thus, there is no necessity for the plaintiff to serve the cause papers of the application for leave to issue a writ of possession on the defendants personally or at their residential address. The fact that the plaintiff did so in this case as reflected in the affidavit of service in encl 23 at para 6 and in the further affidavit of Adinan bin Maning that was affirmed on 17 August 2006 as seen in encl 24 at para 5 merely showed an abundance of caution and an act of diligence and it in no way negate the effect of due service of the cause papers on the defendants' solicitors.

[9] In all the circumstances, I must rule that the defendants' first affidavit in encl 27 is out of time and ought not to be considered in these proceedings.

THE DEFENDANTS' OBJECTION TO THESE PROCEEDINGS LACK MERIT

[10] Even if I were to take into consideration the defendants' first affidavit in encl 27 in adjudicating encl 21, I must say that in any event the defendants' objection to the plaintiff's application is entirely without merit. The sole objection advanced by the defendants is that the order for vacant possession dated 23 March 2006 was not served on the defendants personally (see the averment at paras 4 of encl 27). With respect, the objection is absurd. Notwithstanding the plaintiff's position that the defendants have been served with the order dated 23 March 2006, there is in any event no necessity for personal service of the order. The order itself merely specifies that it needs to be 'served' and that has been done. In my judgment, the defendants have on numerous occasions received the order for vacant possession dated 23 March 2006 or at least had notice of the same. According to O 45 r 7(6) of the RHC, the person against whom or against whose property it is sought to enforce the order has had notice thereof either (a) by being present when the order was made; or (b) by being notified of the terms of the order, whether by telephone, telegram or otherwise (*Husson v Husson* [1962] 1 WLR 1434; *Pearce v Pearce* [1959] CLY para 1451; *Re Bryant* [1877] 4 Ch D 98; *The Seraglio* [1885] 10 PD 120; and *Avory v Andrews* [1882] 51 LJ Ch 414). Permit me to articulate further:

(i) On 23 March 2006, the defendants received notice of the order for vacant possession that was granted by this court on that date through and by reason of the presence of their counsel by the name of Mr S Surendran before this court when the order was granted.

(ii) On 17 April 2006, the order for vacant possession and the cover letters from the plaintiff's solicitors were left in the post-box of the said property for the first defendant and the second defendant (see the averments at paras 2 to 6 of exh 'A–2' as seen in encl 20). Both the first and the second defendants have not denied the fact that the order and

the letters were so left in the post-box for them and they have not alleged that they did not receive the said order and the letters (see the averments at paragraphs 4(iii) and 4(vii) of the defendants' first affidavit in encl 27 where the defendants' merely alleged that the order was not served on them personally or face to face). Consequently, both the first and the second defendants are deemed to have accepted that they were so served with the order for vacant possession dated 23 March 2006, albeit not personally or face to face. It must be emphasised that the defendants' failure to deny or refute the specific averments in the plaintiff's affidavit is deemed to be an admission of those averments (*Ng Hee Thoong & Anor v Public Bank Berhad* [1995] 1 MLJ 281('CA').

(iii) On 18 April 2006, the order for vacant possession dated 23 March 2006 and the cover letters from the plaintiff's solicitors were sent to both the first and the second defendants by way of a registered post (see the averment at para 8 of exh 'A–2' in encl 20). Once again, both the first and the second defendants have not denied the fact that the order and the letters were posted by AR registered post and neither have they alleged that they did not receive the order and the letters that were so posted (see the averments at paras 4(iii) and 4(vii) of the defendants' first affidavit in encl 27). Likewise, they are deemed to have accepted that they were so served with the order and the letters, albeit not personally or face to face.

(iv) On 27 April 2006, the order for vacant possession dated 23 March 2006 and a cover letter from the plaintiff's solicitors were served on the defendants' solicitors Messrs Suren & Ragu (see the averment at para 8 of exh 'A-2' in encl 20). The service of the order and the cover letter is not denied by the defendants or its solicitors. And by virtue of O 12 r 2(3) of the RHC and O 62 r 1 of the RHC and the fact that personal service is not a pre-requisite of an application for leave to issue a writ of possession under O 45 r 3(1)(a) of the RHC, I categorically hold that service of the order on the defendants' solicitors on 27 April 2006 constitutes service of the order on the defendants.

(v) On 5 June 2006, the defendants' solicitors once again received a copy of the order for vacant possession annexed as an exhibit to the affidavit in encl 20 which was served on the defendants' solicitors on that date. The service of this affidavit in encl 20 to the defendants' solicitors is not denied (see para 2 of encl 23). It must be recalled that encl 20 is an affidavit in respect of the application for leave to issue a writ of possession. It cannot be denied that the defendants' solicitors, upon receipt of the cause papers and their palpable presence and involvement in these proceedings, cannot ignore the fact that they have had sight and therefore knowledge of the order for vacant possession and the defendants consequently cannot deny their deemed knowledge of the

same. It is said that knowledge on the part of the solicitor amounts to knowledge on the part of the client. The headnote to the case of *Goddard v Carlisle* [1821] 9 Pri 169, carries the following write-up:

> To constitute the connection of attorney and client, it is sufficient that the party has no other solicitor to whom he is in the habit of resorting for advice, and it is not necessary that the attorney should be shown to be in any particular manner or to any extent, employed in law business for him.

An advocate and solicitor is free to choose his client. And the converse is also true. Thus, a client has a right to counsel of his own choice (*Oswald Hickson Collier & Co v Carter-Ruck* [1984] All ER 5).

(vi) On 16 August 2006, the defendants received a copy of the order for vacant possession which was annexed as an exhibit to encl 20 and which the plaintiff's solicitors on that date served upon the occupant of the said property (see the averments in paras 4 to 6 of encl 23). The defendants have not denied that encl 20 was received by the occupant of the said property nor have they denied that service of encl 20 on 16 August 2006 is personal service of the said affidavit on both the first and the second defendants. It must be borne in mind that the defendants' second affidavit in reply affirmed by Yoong Wan Hoi on 26 September 2006 as seen in encl 26 does not deny nor refute any of the allegations in the affidavit of service in encl 23. Given that encl 20 contained a copy of the order for vacant possession, the service and receipt of encl 20 on 16 August 2006 is deemed to be good service on all the occupants of both encl 20 and the order for vacant possession exhibited therein.

(vii) On 17 August 2006, the first defendant received a copy of the order for vacant possession as it was annexed as an exhibit to encl 20 which the first defendant acknowledges that he has received by registered post on that date (see the averment of Yoong Wan Hoi in his first affidavit in reply at para 3 of encl 27).

(viii) On 17 August 2006 or thereabouts, the second defendant once again received a copy of the order for vacant possession as it was annexed as an exhibit to encl 20 which was sent by registered post to the second defendant (see the averments at paras 4 to 6 of encl 23). The second defendant have not denied that encl 20 was sent to them by registered post nor have they alleged that they did not receive the said posted document. It must be borne in mind that the defendants' second affidavit in encl 26 does not deny nor refute any of the allegations in encl 23.

(ix) Finally, on or by 29 August 2006, the second defendant had sight of or had notice of the order for vacant possession. It must be recalled that the first defendant affirmed the defendants' first affidavit on 29 August 2006 in encl 27 in response to the application for leave to issue a writ of possession in which the first defendant admitted having received copies of the cause papers in that application including encl 20 which contains copies of the order for vacant possession. Thus, when the second defendant submit themselves to this court to defend these proceedings they must be taken to have had sight of the order for vacant possession, copies of which are scattered throughout the cause papers to the application for leave to issue the writ of possession.

[11] It is the judgment of this court that personal service of the order of vacant possession or indeed any other documents on the defendants is not necessary to enable the plaintiff to apply for and obtain leave to file a writ of possession. Order 45 r 3 of the RHC states as follows:

3. Enforcement of judgment for possession of immovable property (O 45 r 3)

(1) Subject to the provisions of these rules, a judgment or order for the giving of possession of immovable property may be enforced by one or more of the following means, that is to say –

(a) writ of possession;

(b) in a case in which r 5 applies, an order of committal.

(2) A writ of possession to enforce a judgment or order for the giving of possession of any immovable property shall not be issued without the leave of the Court except where the judgment or order was given or made in a charge action to which O 83 applies.

(3) Such leave shall not be granted unless it is shown that every person in actual possession of the whole or any part of the immovable property has received such notice of the proceedings as appears to the Court sufficient to enable him to apply to the Court for any relief to which he may be entitled.

(4) A writ of possession may include provision for enforcing the payment of any money adjudged or ordered to be paid by the judgment or order which is to be enforced by the writ.

And the plaintiff's application in this case is limited to a request for leave to issue a writ of possession and this can clearly be seen from the words employed in encl 21 as reproduced earlier. While the order for vacant possession dated 23 March 2006 contains a penal notice under O 45 r 7 of

the RHC and such notice is only relevant to an application for committal which the plaintiff's application herein clearly is not.

[12] In so far as the plaintiff's application for leave to issue a writ of possession against the defendants as seen in encl 21 is concerned, the plaintiff need only show that it has given all persons in actual possession notice of the proceedings as appears to the court sufficient to enable them to apply to the court for any relief to which they may be entitled.

ALL PERSONS IN ACTUAL POSSESSION ARE PARTIES TO THIS ACTION

[13] The defendants' first affidavit in encl 27 identifies all the persons in actual possession or occupation of the said property for which the writ of possession is sought and they are as follows:

(i) Yoong Wan Hoi, who is the first defendant in this action; and

(ii) Yoong Chun Fah, Chong Lee Fah, Yoong Yilin, Yoong Daren, Yoong Chin Fah and Yolanda Sorbito.

[14] Yoong Chun Fah, Chong Lee Fah, Yoong Yilin, Yoong Daren, Yoong Chin Fah and Yolanda Sorbito have been identified and acknowledged in the defendants' statement of defence in this action as collectively being the second defendant in this action (see para 3 of the statement of defence and counterclaim which is exhibited as exh 'YWH–1' in the defendants' first affidavit in encl 27). Therefore, all persons acknowledged by the defendants to be in occupation and possession of the said property are already parties to this action. Save for the first defendant and the second defendant, no one else has been alleged by the defendants to be in possession of the said property.

[15] The first defendant and the second defendant, from the commencement of this action, right through to the grant of the order for vacant possession and in the current proceedings for leave to issue a writ of possession, have been represented by solicitors namely Messrs Suren & Ragu. No formalities are required in order to constitute a valid retainer. But an agreement as to remuneration which includes a salaried retainer has to be in writing and signed by the client or his agent (see ss 114 and 116 of the Legal Profession Act 1976 (Act 166)). Speaking generally, a retainer does not have to be in writing and it may be orally done. It may also be inferred from acts subsequently done by the solicitor and acquiesced to by the client (*Pinley v Bagnall* [1723] 3 Doug KB 155; *Blyth v Fladgate* [1891] 1 Ch 337; and *Taman Zahari Zabidi Sdn Bhd v Adnan Sundra & Low* [1999] 1 MLJ 424, 425). In *Datuk Jagindar Singh v Tara Rajaratnam* [1983] 2 MLJ 196, a person by the name of Dr Das managed to persuade the respondent to put up her

property as security as part of the inducement to the appellant to be a guarantor of Dr Das's overdraft facilities. After a meeting in the respondent's house, where she was asked to sign various documents relating to her property, the appellant's law firm wrote to the bank to which the respondent's property was charged stating that they were acting for the respondent. The then Federal Court held that in these circumstances, although the firm had sent no bill of costs to the respondent, they were acting for the respondent and a solicitor and client relationship subsisted between them. I even venture to say that a client is presumed to undertake to pay whatever the consultation and representation will cost (*Adams v London Improved Motor Cars Bureau Ltd* [1921] 1 KB 495). Normally, a client will resist to pay a bill of costs on the ground of an absence of a retainer (*Re Bracey* [1845] 8 Beav 266). Of significance would be this. That a client is not responsible for costs incurred before the retainer is concluded (*Re Watson* [1886] 18 QBD 116, affirmed later vide [1887] 19 QBD 234). So, it is advisable that a prudent advocate and solicitor must procure a formal retainer as soon as possible. Without a retainer, the advocate and solicitor runs a considerable risk of not being able to enforce and recover his costs. Without a retainer, it would be the case of an assertion against an assertion. The advocate and solicitor asserting that there was a retainer while the client keeps denying it. Ultimately, the advocate and solicitor will be the loser (*Re Gray* [1869] 20 LT 730; and *Stephen Chang Holding Sdn Bhd v Goh & Associates* [1989] 3 MLJ 497). The onus of proof of a retainer is put on the shoulder of the advocate and solicitor and not on the client (*Pinner v Knights* [1843] 6 Beav 174; *Re Paine* [1912] 28 TLR 201; and *Griffiths v Evans* [1953] 1 WLR 1424). It is the advocate and solicitor who must prove the existence of a retainer. Crompton J, in *Emmens v Elderton* [1853] 4 HLC 624 p 634 aptly said:

> To retain and employ an attorney does not of course mean to enter into litigation every day for his benefit, any more than to retain and employ a surgeon would mean to give him occupation every day; but it does mean to give him work if and whenever it shall arise, and a refusal ever to give him such work, though made before the work arises, is a breach of the agreement.

[16] According to the case of *Mason v Grigg* [1909] 2 KB 341, a solicitor who is retained to conduct litigation must place his name on the record as solicitor for the party whom he represents. This is so because of the doctrine of estoppel in that such a solicitor is taken to represent his client whether or not the solicitor has in the meantime discharged himself or has been discharged by his client. Here, on record Messrs Suren & Ragu represents both the defendants right from the start. Thus, all the documents which may be served on the client's solicitor will be validly served if they are served on the solicitor on the record (*Asia Commercial Finance (M) Bhd v Pasadena Properties Development* [1991] 1 MLJ 111; and *Yukilon Manufacturing Sdn Bhd v Dato' Wong Gek Meng (No 2)* [1998] 5 MLJ 1 p 15). In this instance,

it would be Messrs Suren & Ragu. And putting the solicitor's name on record serves to facilitate service for the opposite party who is entitled to treat the solicitor on record as such until his name is removed forthwith (*Gamlen Chemical Co (UK) Ltd v Rochem Ltd* [1980] 1 All ER 1049).

NOTICE OF THE PROCEEDINGS HAS BEEN GIVEN TO THE DEFENDANTS

[17] It is interesting to ascertain what constitutes 'notice of the proceedings'? This phrase calls for the interpretation of two disparate elements, namely, 'notice' and 'the proceedings'. From the current state of the authorities, the following observations must be made:

(a) Notice need not be personal notice. Service of the cause papers on the solicitors on record is deemed notice on the persons in possession of the said property. Thus, the participation of those solicitors on record leading up to the order for vacant possession or leading up to the proceedings for leave to issue a writ of possession would be deemed participation of the persons in possession of the said property.

(b) The proceedings would and could refer to either the proceedings under which the order for vacant possession was obtained or the proceedings for leave to issue a writ of possession. In the context of the present case, both the defendants have had notice of both sets of proceedings.

[18] In *OCBC Bank (Malaysia) Bhd v Unimasco Sdn Bhd & Ors* [2004] MLJU 194, Low Hop Bing J (now JCA) was asked to consider whether personal service of an order for summary judgment was necessary before the time limit to set aside the judgment under O 42 r 13 of the RHC could start running. This was what his Lordship said at pp 8–9:

> The relevant portion of O 42 r 13 merits reproduction as follows:
>
> > 13. Where in these rules provisions are made for the setting aside… of any order or judgment, a party intending to set aside … such order or judgment must make his application to the court within thirty days after the receipt of the order or judgment by him.
>
> In my judgment, service of the order by AR registered post on the second defendant's former solicitors on 28 October 1998 is effective service of the order on the second defendant, as the former solicitors were at all material time the solicitors on record for the second defendant, and so constitutes 'the receipt of the order' by the second defendant under O 42 r 13.
>
> Further O 62 r 13 provides that where a party, such as the second defendant herein, after having appeared in person, in this case, by filing a memorandum of appearance through his former solicitors and thus giving notice in writing to the

A opposite party such as the plaintiff or its solicitors that such former solicitors are authorised to act in the cause or matter on his behalf, all summonses orders and other documents which ought to be delivered to or served upon the second defendant as the party on whose behalf the notice is given shall hereafter be delivered to or served upon such solicitors.

B Proceeding to pp 11–12, his Lordship has this to say:

> Further, the second defendant's former solicitors have not filed any affidavit to deny receipt of the order. That being the case, the plaintiff's affidavit of service stood uncontradicted and is hereby treated as an admission of the service: *Ng Hee*
C *Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281.
>
> In *Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85, the Federal Court through the judgment of Gill CJ(M) (as he then was) enunciated the general rule that knowledge of a solicitor is the knowledge of the client, following the dictum of Lord Hatherley LC in *Rolland v Hart* [1870] Ch App 678, 681 and *Stuart v*
D *Kingston* [1923] 32 CLR 309 HC Australia.

[19] Now, the order for vacant possession in this case was entered pursuant to the summary judgment. If service of an order for summary judgment need
E not be personal and the service of the order on the defendant's solicitors is sufficient to constitute 'receipt of the order' under O 42 r 13 of the RHC, then by logical inference, the service of the order for vacant possession on the defendants' solicitors in this case would surely be sufficient to constitute 'notice of the proceedings' under O 45 r 3(3) of the RHC.

F

[20] In *Lim Kok Liam & Sons Sdn Bhd v Lau Choon Wan t/a Restoran Paramount Garden and third party* [1996] MLJU 312, the intervener applied to stay the execution of the writ of possession on the basis that he was not given notice of the proceedings for leave to issue the writ of possession.
G The plaintiff had applied for the writ of possession upon obtaining an order for vacant possession against the defendant. The plaintiff had previously applied for, and then abandoned, a prior writ of possession under which suit the same intervener had also intervened. Abdul Wahab Patail J, held that as the intervener's solicitors had been both served a copy of the order for vacant
H possession and had participated in the prior proceedings for leave to issue a writ of possession, the intervener was deemed to have sufficient notice under O 45 r 3(3) of the RHC. At p 263 of the report, this was what his Lordship said:

I

> Order 45 r 3(3) sets out the conditions before leave to issue a writ of possession is granted. The question is whether Leong Yok Chin received such notice of the proceedings as appears to the Court sufficient to enable him to apply to the Court for any relief to which he may be entitled. Granted that the copies of orders served upon Leong Yok Chin's solicitors are orders against the defendant without any mention of Leong Yok Chin, he having the professional assistance of solicitors and

having applied to intervene in earlier writ of possession proceedings in respect of the same premises and between the same plaintiff and defendant, cannot say he had not had sufficient notice to apply to the Court for any relief to which he may be entitled and has been prejudiced thereby. He had not taken any action until 4 June 1996. Since at least 25 January 1996 when leave was granted to intervene in A/E 37-74-95 he had become aware of proceedings by the plaintiff to recover the premises. Further notice was given in March.

What can be derived from submissions is that the plaintiff had sued the defendant for vacant possession and obtained judgment. There is no relationship between the plaintiff and Leong Yok Chin, who presumably derives his rights from the defendant. Merely that his name is not put on the documents as a party or intervener, or that the application for leave for issue of the writ of possession is not served upon him is immaterial so long as a notice has been given of proceedings for recovery of possession.

[21] Thus, the mere fact that the names of the individuals who occupy the said property, that is Yoong Chun Fah, Chong Lee Fah, Yoong Yilin, Yoong Daren, Yoong Chin Fah and Yolanda Sorbito, are not specifically stated in the order for vacant possession or in the cause papers to the application for leave to issue a writ of possession is immaterial, as these selfsame individuals are and were at all times the second defendant in this action, duly represented by solicitors at the hearing of the summary judgment application under which the order for vacant possession was granted and in these proceedings for leave to issue a writ of possession. Being so represented, each and every one of them must be deemed to have knowledge of the order for vacant possession as well as the cause papers to the application for leave to issue a writ of possession because the said documents were served on their solicitors and because their solicitors participated and are still participating in the said proceedings. It must be borne in mind that the knowledge on the part of the solicitor is also the knowledge on the part of the client.

[22] In *Chu Ah Falt v Abdullah Abdul Majid* [1998] 5 MLJ 446, Augustine Paul JC (now FCJ) held that service by AR registered post of the default judgment granting the plaintiff vacant possession, constitutes 'notice of the proceedings'. The definition of the 'notice of the proceedings' is sufficiently set out at pp 454–455 of the report:

Thus the crux of the contention of both parties centers on the type of notice that the appellant must have had in order to warrant leave being granted to the respondent to issue the writ of possession. The language employed in O 30 r 3(3) makes it manifestly patent that receipt of notice of the proceedings by the person in actual possession of the immovable property in question is a pre-requisite to be satisfied by an applicant before he can be granted leave. In my opinion the word 'proceedings' in the phrase '…. such notice of the proceedings as appears to the court sufficient…' in O 30 r 3(3) gives the court a wide discretion to determine the sufficiency of the notice that is required. There is no restriction in the form of

notice that is required but it must be such that it enables the court to be satisfied that it is '…. sufficient to enable him to apply to the Court for any relief to which he may be entitled' as prescribed in O 30 r 3(3). Thus, a notice will come within the ambit of the sub-rule if it has the effect of informing a person of the proceedings for vacant possession against him. The purpose of the notice is to enable a person to apply to court for any relief to which he may be entitled. To my mind, therefore, what would constitute sufficient notice for the purpose of this rule would be, inter alia, the service of the summons commencing the action or the order of court obtained on the summons on the person in actual occupation. In an appropriate case the service of the application for leave to issue the writ of possession itself would also constitute sufficient notice. To that extent the submission of learned counsel for the appellant that the word 'proceedings' in O 30 r 3(3) refers to only the application for leave to issue the writ cannot be sustained. In the premises an application for such leave may be made ex parte where the person in actual occupation has had notice of the proceedings by any other sufficient means.

[23] In my judgment, 'the proceedings' under O 45 r 3(3) of the RHC must necessarily mean the proceedings under which the primary order for vacant possession was granted and it is not restricted to the proceedings for leave to issue a writ of possession. It follows therefore that the plaintiff here need only to show that the defendants had notice of the order for vacant possession.

[24] One must not lose sight of the fact that the purpose of O 45 r 3(3) of the RHC is to bring notice to the defendants in order to enable them to apply for relief from the same. The purpose is not to effect personal service of the order for vacant possession. The defendants have been very cautious. For all their objections, the defendants themselves in their affidavits carefully try not to perjure themselves by denying knowledge of the order for vacant possession or that they have in actual fact received the order for vacant possession. Their one litany is a denial of 'personal service' of the order, which they vehemently appear to define as 'face to face' service.

[25] Be that as it may, the defendants cannot deny knowledge of the application for leave to issue a writ of possession given that the cause papers were served on both of them and their solicitors and receipt has been acknowledged (see paras 2 to 6 of encl 23 and to para 3 of encl 27). Now, even if the defendants deny receipt of the order for vacant possession, they have had notice of these proceedings well before 29 August 2006 when they filed their first affidavit. Calculation wise they have had in excess of a month's notice to apply for the necessary relief from the application.

[26] I must reiterate that the purpose of O 45 r 3(3) of the RHC is to enable the defendants to apply for relief from a writ of possession.

The defendants indisputably have had notice of all the proceedings in this matter, namely, the summary judgment application leading up to the order of vacant possession, the order for vacant possession that was granted on 23 March 2006 and all the cause papers and proceedings under the application for leave to issue a writ of possession. The truth of the matter is that the defendants' mere presence in and defence of this application is evidence that they have received notice of the proceedings. Yet the baffling fact remains and that is that the defendants have not applied for relief.

THE DEFENDANTS' ARGUMENTS

[27] There are two arguments canvassed by the defendants. But these two arguments contradict each other and they pay scant attention to the facts. The arguments may be stated as follows:

(A) That the plaintiff's application for leave to issue a writ of possession is subject to the rules of procedure for committal proceedings, namely, O 45 rr 5 and 7 of the RHC and not those of applications for leave to issue writs of possession under O 45 r 3(3) of the RHC.

(B) Alternatively, and may I say contradictorily, it is argued that the plaintiff's application for leave to issue a writ of possession is not subject to the rules of procedure for committal proceedings but to O 45 r 3(3) of the RHC, which provision it is alleged, requires personal service on all the occupiers.

[28] I will now examine arguments (a) and (b) separately and in quick succession.

ARGUMENT (A)

[29] It will be divided into two subheads. I will now proceed to examine them.

The requirement for personal service under O 45 rr 5 and 7 of the RHC

[30] I have no quarrel with the averment that in an application for committal proceedings the Order sought to be executed must be served personally on the party in breach of the Order. This issue is completely irrelevant to the present case at hand. The plaintiff here is not commencing committal proceedings but rather proceedings for the issue of the writ of possession which is governed by an entirely different provision and that would be O 45 r 3 of the RHC.

The penal notice in the order for vacant possession

[31] In order to prop-up their argument that O 45 rr 5 and 7 of the RHC apply to the application before this court, the defendants have zealously latched onto the words 'defendan-defendan boleh dikenakan proses pelaksanaan' ('the defendants are liable to be subject to the process of execution') that appear in the penal notice to the order for vacant possession. The defendants emphasise the said phrase to this court, shorn of its context, in determined ignorance of the rest of the clear words of the penal notice and in blatant disregard for the nature of the application before this court.

[32] The defendants' arguments in regard to argument (a) ignore the following set of facts:

(i) That the penal notice in the order for vacant possession is specifically headed 'Pengindorsan di Bawah A 45 k 7' ('Indorsement under O 45 r 7'). It is therefore clear that the indorsement applies only to proceedings under O 45 r 7 of the RHC.

(ii) The defendants too have ignored the fact that O 45 r 7 of the RHC relates only to committal proceedings and not to writs of possession.

(iii) The defendants conveniently chose to overlook O 45 r 7(4) of the RHC which makes it mandatory for a plaintiff who wishes to reserve the right to enforce an order by committal proceedings to include in the order an indorsement that if the defendant disobeys the order he is liable to process of execution to compel him to obey it. For convenience, I will now reproduce O 45 r 7(4) of the RHC:

> (4) There must be indorsed on the copy of an order served under this rule a notice in Form 87 informing the person on whom the copy is served–
>
> (a) in the case of service under para (2), if he neglects to obey the order within the time specified therein, or, if the order is to abstain from doing an act, that if he disobeys the order, he is liable to process of execution to compel him to obey it; and (b) in the case of service under para (3), that if the body corporate neglects to obey the order within the time so specified or, if the order is to abstain from doing an act, that if the body corporate disobeys the order, he is liable to process of execution to compel the body to obey it
>
> (b) in the case of service under para (2), if he neglects to obey the order within the time specified therein, or, if the order is to abstain from doing an act, that if he disobeys the order, he is

liable to process of execution to compel him to obey it; and (b) in the case of service under para (3), that if the body corporate neglects to obey the order within the time so specified or, if the order is to abstain from doing an act, that if the body corporate disobeys the order, he is liable to process of execution to compel the body to obey it

A

B

And a copy of Form 87 of the RHC is worded as follows:

C

No 87
NOTICE ON CERTAIN JUDGMENTS (O 45 r 7)

The indorsement should be in the following words or words to the following effect:

D

(a) In the case of a judgment or order requiring a person or body corporate to do an act within a specified time–

If you, the within-named ..... (or.....) neglect to obey this judgment (or order) by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same.

E

(b) In the case of a judgment or order requiring a person to abstain from doing an act–

F

If you, the within-named ..... disobey this judgment (or order), you will be liable to process of execution for the purpose of compelling you to obey the same.'

G

In the case of a judgment or order requiring a body corporate to do or to abstain from doing the act, but it is sought to take enforcement proceedings against a director or other officer of that order.

H

If ..... neglect to obey this judgment (or order) by the time therein limited (or in the case of an order to abstain from doing an act, if ..... disobey this judgment (or order), you (a director or officer of the said .....) will be liable to process of execution for the purpose of compelling the said to obey the same.

I

(iv) The penal notice in the order merely conforms to the wording of O 45 r 7(4) and Form 87 of the RHC. The Malay language text reads as follows:

A

> Jika kamu……. abai untuk mematuhi Perintah ini mengikut masa yang dihadkan dalamnya itu atau dalam tempoh masa 14 hari dari penyampaian Perintah ini…… Defendan-defendan boleh dikenakan proses pelaksanaan bagi maksud memaksa kamu mematuhinya.

B

And the English language translation reads as follows:

> Should you …… fail to obey this Order according to the time limit therein or within 14 days from the service of this Order …….. the Defendants are liable to process of execution to compel you to obey it.

C

(v) The penal notice in the order for vacant possession is included for the sole purpose of satisfying O 45 r 7(4) of the RHC in the event the plaintiff wishes to enforce the order for vacant possession by way of committal proceedings. It must be borne in mind that the phrase 'Defendan-defendan boleh dikenakan proses pelaksanaan bagi maksud memaksa kamu mematuhinya' incorporated in the penal notice is in fact the mandatory phrase taken directly from O 45 r 7(4) of the RHC and Form 87 of the RHC. The service copy of the judgment or order must contain the requisite notice in Form 87 of the RHC warning the person served that if he neglects to obey or disobeys the judgment or order, he will be liable to process of execution for the purpose of compelling him to obey the same. Authorities have shown that the failure to insert the penal indorsement in the order is fatal to an application for committal (*Leow Seng Heat v Low Mui Yein* [1996] 5 MLJ 381; and *General (Rtd) Tan Sri Hashim Mohd Ali & Anor v Francis s/o M G Mirandah* [2000] MLJU 436).

D

E

F

(vi) The defendants have ingeniously side stepped the fact that the body of the order for vacant possession only requires that the order be served on the defendants, and not on the defendants personally (see pp 2 to 3 of encl 8). Had it been necessary for the plaintiff to serve the order personally in order to commence any form of enforcement proceedings then the body of the order must specify as such. It is not the case here.

G

H

[33] Not to be outwitted, the defendants argued along the following lines:

I

- that the words 'proses pelaksanaan' ('process of execution') in the penal notice in the order means 'writ of execution';
- that the words 'writ of execution' would include 'writs of possession';
- therefore the words 'proses pelaksanaan' ('process of execution') would include 'writs of possession'; and

- consequently, the writs of possession are subject to O 45 r 7 of the RHC.

[34] The truth of the matter is this. That O 45 r 7 of the RHC is limited in its application to proceedings under O 45 r 5 of the RHC and O 45 r 5 of the RHC relates only to committal proceedings. O 45 r 7 of the RHC does not apply to writs of execution. If it did, the framers of the rules of the High Court would have specifically included in the said rules to the effect that all writs of execution under O 46 of the RHC and writs of possession under O 45 r 3 of the RHC are subject to O 45 r 7 of RHC.

[35] It must be emphasised that the phrase 'defendan-defendan boleh dikenakan proses pelaksanaan' ('the defendants are liable to process of execution') is taken directly out of O 45 r 7(4) of the RHC and Form 87 of the RHC for the process of execution by way of committal proceedings.

[36] It is now too late in the day for the defendants to take the word 'execution' out of that phrase blithely ignoring that that word comes from the statutorily prescribed penal notice for committal proceedings only and then attach a contrary meaning to it by including all forms of writs of execution. To allow it to be done would be equivalent to 'madly squeezing a right-hand foot into a left-hand shoe'. That would certainly be uncomfortable.

ARGUMENT (B)

[37] By way of an alternative argument, the defendants accept the inapplicability of the rules governing committal proceedings to this application for leave to issue a writ of possession. But the defendants continue to insist that personal service is the only means of giving 'notice of the proceedings' and that all the occupiers of the said property must be personally served. I will now examine argument (b) under three subheads.

The fallacy that the 'notice of proceedings' is equivalent to 'personal service'

[38] To say that 'notice' is equivalent to personal service is wrong. The equation is in fact a contradiction in terms. Permit me to elaborate.

[39] To give 'notice' of a fact to a person is to bring it to his attention. A person has notice of a fact when the circumstances are such that he is either actually aware of the fact or might or ought to be aware of it. *Jowitt's Dictionary of English Law* (2nd Ed) by John Burke at p 1253 carries the following write-up:

A To give notice of a fact to a person is to bring it to his knowledge: when the circumstances are such that he is either actually aware of the fact, or might or ought to be aware of it, he is said to have notice of it.

[40] And whether the notice of the proceedings has been provided for is a B question of fact and it can be oral and it need not emanate from the plaintiff. *Stroud's Judicial Dictionary Of Words And Phrases*, (7th Ed) by Daniel Greenberg, at pp 1803 to 1804 contains the following explanation:

Notice (of proceedings). In the absence of prescribed formalities, whether a requirement to provide notice of proceedings has been complied with is a matter C of fact. Notice can be oral and need not emanate from the claimant. But there is a distinction between notice of a legal claim being pursued and notice that specific proceedings have been commenced (*Wake v Page* [2001] RTR 291, (CA)).

[41] The cases of *Lim Kok Liam* and *Chu Ah Falt* set out the following D principle of law. That 'the proceedings' under O 45 r 3(3) of the RHC refer to the proceedings under which the primary order for vacant possession would be granted. And from the facts of these two cases, it is clear that personal service is not necessary for the satisfaction of O 45 r 3(3) of RHC.

E **[42]** Here before me, the plaintiff has served the defendants and gave notice of both the order for vacant possession and the cause papers to the application for leave to issue a writ of possession. It is interesting to note that while the defendants have denied being personally served with the documents, they have not denied and in some cases have actually conceded that the said F documents were received by them through the various methods of service adopted by the plaintiff — be it by leaving at the said property or leaving it at the said property with persons there or by way of a registered post or through service on their solicitors. Incidentally, the defendants have not denied the assertions of the plaintiff in para 6 of encl 24 to the following effect:

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… the first and second defendants have been given due and sufficient notice of:

(i) the order and its contents which inter alia require the first and the second defendants to surrender vacant possession of the property referred to therein within fourteen (14) days from the date of service H of the order;

(ii) the plaintiff's application to issue a writ of possession upon the failure of the first and the second defendants to comply with the order.

I

The selective application of Lim Kok Liam and Chu Ah Falt cases by the defendants

[43] The defendants relied on these two High Court cases for the

proposition that the plaintiff is obligated to show that it has given all the occupiers of the said property notice of the proceedings and that in addressing its cover letters in regard to the order for vacant possession to the first defendant and to the 'occupants' and not to each and every occupier, the plaintiff has failed to discharge this burden. With respect, the defendants' statement of the law is erroneous or at the very least incomplete. The law is not that the plaintiff must show that notice has been given to all the occupiers. The correct position of the law is that the plaintiff must show that notice has been given to all the occupiers who are not defendants to the action for vacant possession. This is consonant with the legal position adopted in the cases of *Lim Kok Liam* and *Chu Ah Falt* that once the defendants to the original proceedings for vacant possession have been shown to have had notice of those proceedings or any order thereunder, they are deemed to have 'notice of the proceedings' within the meaning of O 45 r 3(3) of the RHC. Subsequently, for the application to issue a writ of possession, the plaintiff need only show that it has given notice to any other occupier of the said property in question who was not a defendant to the original proceedings. This is clear from the judgment of the High Court in the case of *Chu Ah Falt* at p 455 of the report:

> Where there are persons in actual possession other than the person against whom judgment has been obtained then the affidavit must disclose that all of them have received notice of the proceedings.

[44] In the present case at hand, all the occupiers are defendants to the action. This is made clear in the defendants' defence which identifies the individuals that make up the second defendant and confirmed in the defendants' affidavits in these proceedings which show that no other party currently occupies the said property. Furthermore, the plaintiff has stated on affidavit that the defendants have been given due notice of the proceedings and that no others are in possession of the said property. This very affidavit stands unrebutted and undenied by the defendants (see paras 6 and 7 of encl 24 and the defendants have not filed an affidavit in reply to encl 24).

[45] The defendants' stand is that the plaintiff must affect personal service of the order for vacant possession under O 45 r 3(3) of the RHC. The High Courts in *Lim Kok Liam* and *Chu Ah Falt* accepted far less than personal service in satisfaction of O 45 r 3(3) of the RHC. In *Lim Kok Liam*, the High Court held that service of the application for leave to issue a writ of possession which contained a copy of the order for vacant possession on the intervener's solicitors was sufficient to give the intervener notice of the proceedings (see p 206 f–h and p 263 a–e of the report). Whereas in *Chu Ah Falt*, the order for vacant possession was served by AR registered post on the defendant (see p 452 d of the report). As demonstrated, it has been shown that the plaintiff here has adopted not one but both of the above methods of

service on the defendants. Additionally, the plaintiff left copies of the order for vacant possession in the post box of the said property to the attention of the first and the second defendants and the plaintiff also affected service of the cause papers to this application on the defendants by leaving it at, and posting it to, the said property and by serving onto the defendants' solicitors. Clearly therefore the plaintiff has gone over and above what is legally necessary for sufficient 'notice of the proceedings' to be given to the defendants.

Whether the application for leave to issue a writ of possession considered as a fresh action?

[46] The defendants argue that encl 21 is a fresh action despite the fact that it is commenced under the existing action and flowing from that the defendants argue that the service of the application must be done on the defendants personally. With respect, this is an empty submission with no legal authority tendered in support of it. The defendants' conduct is contrary to their allegations. For example, if personal service was required why did Messrs Suren & Ragu accept service of the cause papers of encl 21 not once, but twice? With respect, the defendants' actions in this case speak louder than their words.

Further arguments of the defendants

[47] The defendants relied on the excerpts from *Janab's Key to Procedure in Malaysia and Singapore* ('*Janab's*') together with the case laws quoted therein for the proposition that all orders for possession of property must carry a Form 87 of the RHC penal notice indorsement for any forms of enforcement, be it committal or by way of a writ of possession. The defendants say that given that Form 87 is also a requirement under O 45 r 7(4) of RHC, then O 45 r 7(2) of the RHC must also apply to all orders for possession, necessitating their personal service for all enforcement purposes.

[48] There are apparent flaws in the defendants' arguments. Firstly, that O 45 r 7(2) of the RHC expressly specifies that it only relates to applications for committal and that would be O 45 r 5 of the RHC. Secondly, that the rules governing writs of possession proceedings (that is, O 45 r 3 of the RHC) specifies that mere 'notice of proceedings' on occupiers and not 'personal service' is sufficient.

[49] I will now focus my attention to the proposition in *Janab's* upon which the defendants have now tacked their submissions. With respect, I say that the contention in *Janab's* is flawed and out-dated. The contention in *Janab's* states as follows (see p 629):

> To enforce a judgment or order for possession of land, it is mandatory to serve the judgment or order endorsed with a notice in Form 87 informing him that if he neglects to obey the order within the time specified, he will be liable to process of execution to compel him to do so.

In support of the proposition, the editors of *Janab's* have cited two Malaysian cases, *Arumugam v Suppiah Chettliar* [1935] MLJ 4 (CA), ('*Arumugam*') and *The Vanda* [1960] MLJ 283 (CA) ('*Vanda*') — both these two cases have held that orders for interrogatories or discovery can only be enforced if the orders were indorsed with a penal notice. *Vanda* relied solely on *Arumugam* in reaching its conclusion and *Arumugam* in turn relied solely on the English Court of Appeal case of *Hampden v Wallis* [1884] 26 Ch D 746.

[50] With respect, the editors of *Janab's* appear to have overlooked the fact that the rules of civil procedure upon which *Hampden v Wallis*, and in turn *Arumugam* and *Vanda* were based, are and have been repealed and obsolete for the last 40 years, both in England and in Malaysia. Consequently, these three authorities are now bad law in so far as they promulgate a legal principle that all judgments or orders of court to do an act must carry a penal notice in order to be enforceable by any mode of execution.

Hampden v Wallis was decided in the days of the now defunct O 41 r 5 of the Rules of the Supreme Court 1883 ('RSC 1883') which provided that (see pp 747–748 of *Hampden v Wallis*):

> every judgment or order made in any cause or matter requiring any person to do an act thereby ordered shall state the time, or the time after service of the judgment or order, within which the act is to be done, and upon the copy of the judgment or order which shall be served upon the person required to obey the same, there shall be indorsed a memorandum in the words or to the effect following, viz. —
>
> > If you, the within named AB, neglect to obey this judgment [or order] by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same judgment [or order].

So, under the RSC 1883, it was necessary that all orders requiring the doing of an act carry a penal notice in order to be enforceable.

[51] The rules of civil procedure applicable in Malaysia when *Arumugam* and *Vanda* were decided adopted an identical provision to that of O 41 r 5 of the RSC 1883, and *Arumugam* and *Vanda* were decided, on the interpretation of that identical provision. In respect of *Arumugam* where the rule of civil procedure under contemplation was s 560 of the Civil Procedure Code which was in pari material to O 41 r 5 of the RSC 1883. In *Vanda*, a Singapore case, the rule under contemplation was O 39 r 5 of the RSC, identical in content to both s 560 of the Civil Procedure Code and O 41 r 5 of the RSC 1883

[52] Historically speaking, in 1965, the RSC 1883 was repealed and replaced by the Rules of the Supreme Courts 1965 ('RSC 1965'). These new rules made significant changes to the substance and enforcement provisions of judgments and orders. Specifically, O 41 r 5 of the RSC 1883 was replaced by O 42 r 2 of the RSC 1965 and the latter reads as follows:

> Judgment, etc., requiring act to be done: time for doing it (O 42 r 2).
>
> (1) Subject to para (2), a judgment or order which requires a person to do an act must specify the time after service of the judgment or order, or some other time, within which the act is to be done.
>
> (2) Where the act which any person is required by any judgment or order to do is to pay money to some other person, give possession of any land or deliver any goods, a time within which the act is to be done need not be specified in the judgment or order by virtue of para (1), but the foregoing provision shall not affect the power of the Court to specify such a time and to adjudge or order accordingly

[53] Now, the distinguishing factor between O 41 r 5 of the RSC 1883 and O 42 r 2 of the RSC 1965 is that it no longer becomes mandatory for all judgments and orders for the doing of an act to carry a penal notice. By the RSC 1965, the requirement to endorse a penal notice on a judgment or order is only necessary where committal proceedings are sought, as evident by O 45 r 7 of the RSC 1965. O 42 r 2 of the RSC 1965 is in pari materia with O 42 r 3 of the RHC, while O 45 r 7 of the RSC is in pari materia with O 45 r 7 of the RHC. Nowhere in the RHC is there a provision identical to the defunct O 41 r 5 of the RSC 1883.

[54] Concisely put, *Hampden v Wallis*, *Arumugam* and *Vanda* were all decided before the advent of the RSC 1965 and the RHC and therefore were based on a rule of civil procedure that has since been repealed. Those cases therefore cannot be used as an aid to construe the provisions under the RSC 1965 and the RHC 1980. The RHC is clear and unambiguous: under O 42 r 2, an order or judgment requiring the doing of an act does not need to carry a penal notice in order to be enforceable. A penal notice is only necessary to enforce the order or judgment by way of committal proceedings as specifically provided for under O 45 r 7 of the RHC.

[55] It must be borne in mind that the old cases dealing with O 41 r 5 of the RSC 1883 have long since ceased to be followed in England. In like manner, such cases and the old Malaysian authorities that followed them, should now be laid to rest here, once and for all. In the English Court of

Appeal case of *Hill Samuel & Co Ltd v Littaur* The Times 13 April 1985, Parker LJ, in style, had this to say, in reference to the old case law dealing with O 41 r 5 of the RSC 1883 (see p 7):

> In the light of the change in the rules, the earlier authorities do not in my judgment assist the defendant. I therefore find it unnecessary to refer to them. Interesting as they may be as legal history, they cannot in my judgment affect the outcome of this appeal

Echoing Parker LJ's sentiments, Kerr LJ in his judgment succinctly said (see p 13):

> I only wish to add that in my view Mr Blom-Cooper's approach to the construction of what is now O 45 r 7 of the Rules of the Supreme Court was misconceived in principle when he sought to rely on the old authorities before the changes to the Rules were made in the mid-1960s. In effect his approach was directly contrary to the well-known passage in the speech of Lord Herschell in *Bank of England v Vagliano* [1891] AC 107 at pp 144 to 145, on the correct approach to the interpretation of legislation designed to codify the existing law by means of a new legislative text.

[56] In my opinion, Lord Herschell LJ's words spanning from over a century ago in *The Governor And Company Of The Bank of England v Vagliano Brothers* [1891] AC 107, at pp 144 to 145 best expresses the approach a court should adopt in construing an amending or codifying legislation:

> I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.
>
> If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions, dependent upon a knowledge of the exact effect even of an obsolete proceeding such as a demurrer to evidence. I am of course far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate. Or, again, if in a code of the law of negotiable instruments words be found which have previously acquired a technical meaning, or been used in a sense other than their ordinary one, in relation to such instruments, the same interpretation might well be put

A upon them in the code. I give these as examples merely; they, of course, do not exhaust the category. What, however, I am venturing to insist upon is, that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground.

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[57] And if any doubt remains that orders for possession need not carry a penal notice, then the following remarks of the English Court of Appeal in the case of *Bell v Tuohy* [2002] 3 All ER 975 should put that doubt to rest, once and for all. Neuberger J writing the first judgment of the court at the
C invitation of Kennedy LJ aptly said at p 986 of the report:

> Such a suggestion would, I believe, cause surprise, even consternation, in every county court in England and Wales. It would mean that, for over 15 years, virtually every possession order that has been issued out of a county court has failed to
D comply with the CCR. Quite apart from this, I cannot believe that it could have been the intention of those who drafted the CCR that every possession order made by the county court should routinely contain a penal notice. The majority, indeed I suspect the great majority, of possession orders made in the county court are in respect of the defendant's home. It is upsetting enough for a person to receive a court order requiring him to leave his home; it would add to the pressure if he was
E warned that, if he did not leave on the date specified in the order, he would be liable to be put in prison. Many people against whom possession orders are made hope, expect, or are entitled, to be re-housed by the council, and I believe that it often happens that their re-housing cannot be arranged until after the date on which the possession order is to take effect. The worry of a person who has been
F served with an order with a penal notice in that situation is self-evident. Further, the notion that a penal notice should routinely be attached to a possession order also appears to me to be inconsistent with the view expressed by Lord Denning MR in *Danchevsky v Danchevsky* [1974] 3 All ER 934 at 937, [1975] Fam 17 p 22.

Continuing at pp 990 to 991, Neuberger J, had this to say:

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> First, committal for contempt in any such case is a last resort. Secondly, it is generally undesirable that a penal notice should be attached to a possession order, unless there are good and exceptional grounds. Thirdly, the normal way to enforce a possession order is by requesting and obtaining the issue of a warrant for
H possession. Fourthly, as this case shows, a warrant should be applied for only after the date for possession has gone without the defendant vacating. Fifthly, if the last resort of a contempt application appears necessary, then it is normally more appropriate for the contempt application to be based primarily on the defendant's obstruction of the bailiff when executing the warrant for possession, albeit that in some cases it may be right to rely on the possession order itself. In such a case, it
I would then be sensible to serve a copy of the order for possession with a penal notice, albeit only once the warrant has not been successfully executed due to the defendant's obstruction. Sixthly, to avoid the risk of wasting costs or of unfairness on a defendant, care should be taken to ensure that any committal proceedings comply with the requirements of the rules and PD 29.

[58] Next, the defendants are asking this court to exercise its discretion under O 1A and 2 of the RHC to admit the defendants' first affidavit in encl 27 opposing the plaintiff's application in encl 21 notwithstanding that their affidavit was filed late and out of time. Thus far, the defendants have maintained that their affidavit in encl 27 was not filed late because, according to them, the time limit to file the affidavit must be taken to run from the date of the plaintiff's application and affidavit in support in encl 20 were served on the defendants 'personally' and not from the date the said cause papers were served on the defendants' solicitors.

[59] The defendants' objection to the application for leave to issue a writ of possession is precariously balanced upon an identical, singular premise and that would be that to be granted with a writ of possession, the plaintiff must serve the order for possession and the cause papers for the application on the defendants personally. The defendants say that service on their solicitors is not enough. This therefore constitutes the thrust of the defendants' objection to the substance of the plaintiff's application.

[60] The defendants are not willing to concede that personal service on the defendants of the order for possession and the cause papers for the application is not necessary and that the service of the documents on their solicitors is sufficient. With that in mind, I now make a finding that service of the documents on the defendants' solicitors in lieu of personal service is sufficient for the purposes of an application for leave to issue a writ of possession. Consequently, I am unable to invoke O 1A and 2 of the RHC in favour of the defendants.

CONCLUSION

[61] For all its denials of the notice, the fact of the matter remains for this court to come to a conclusion and that would be that through their counsel, the defendants were present at the hearing of the proceedings for the order for vacant possession and the defendants too are present at this hearing for leave and have filed affidavits in objection. The defendants therefore have notice of the proceedings and the pre-requisite under O 45 r 3(3) of the RHC is therefore satisfied.

[62] The rules of the High Court are unerringly definite in regard to the issue of service. An application for leave to issue a writ of possession does not require personal service because it is not expressly stated (see O 62 r 1(1) of the RHC). All permutations of the penal notice in the order for vacant possession will not make it any more than what it is — a mandatory requirement pursuant to O 45 r 7(4) of the RHC in the event the plaintiff wishes to enforce it by way of committal proceedings.

[63] Here, there is no legal principle, no critical fact or change of circumstance presented by the defendants to disentitle the plaintiff from securing its relief. It is merely an attempt by the defendants to delay the enforcement of an order of this court by 'fair means or foul'. The defendants' refusal to vacate the said property is a contemptuous disregard of the order of this court. It must be recalled that this court granted the order in the presence of the defendants' solicitors and the defendants are now effectively thumbing their noses at this court when they maintain, through the same solicitors, that they do not have notice of it or need not abide by it. In the words of Abdul Hamid Omar LP in *Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217, at pp 220–221:

> It is established law that a person against whom an order of Court has been issued is duty bound to obey that order until it is set aside. It is not open for him to decide for himself whether the order was wrongly issued and therefore does not require disobedience. His duty is one of obedience until such time as the order may be set aside or varied. Any person who fails to obey an order of Court runs the risk of being held in contempt with all its attendant consequences.

[64] In *Affin Bank Bhd v Tan Sri Kishu Tirathrai* [2004] MLJU 246, I applied the above passage to the case of summary judgments where there were no orders for stay of execution. The order for vacant possession in the instant case is also premised upon a summary judgment and no stay of the judgment has been granted.

[65] The bare facts of the case may be stated in this way. That the defendants were given notice of the order on numerous occasions. Fourteen (14) days have come and gone since then without vacant possession being delivered. Meanwhile, the plaintiff has been constrained to expend further time, money and effort to petition this court to enforce the order through a writ of possession. I am inclined to grant the plaintiff's application in encl 21 without further ado and with costs to the plaintiff forthwith. I make those orders accordingly.

ADDENDUM

[66] What is a writ of possession? It may be answered in this way: any judgment or any order to give possession of an immovable property is enforced by way of a writ of possession. And usually, leave of the court is required before the writ of possession is issued (see O 45 r 3(2) of the RHC), except where, as I said earlier, that the judgment or order was given or made in a charge action to which O 83 of the RHC applies. It must be emphasised that the writ of possession will only be issued if there is an actual judgment or an order for possession (*Leong Ah Weng v Neo Thean Soo & Anor* [1983] 2 MLJ 119).

[67] It is always prudent to include in a writ of possession a provision for enforcing the payment of any money adjudged or ordered to be paid by the judgment or order which is to be enforced by the writ (see O 45 r 3(4) of the RHC). It goes without saying that the writ of possession must be in the prescribed form and that would be in accordance with Form 90 of the RHC. Basically, it merely directs the Sheriff to order the immovable property and to 'cause the plaintiff to have possession of it'.

[68] It is not uncommon to find that a judgment or order to give possession of an immovable property is accompanied by a recital that it may be enforced by way of a committal. In a situation where the judgment or order specifies the period for the giving of possession and the person against whom the judgment or order is directed at refuses or neglects to obey, then it may be enforced by way of a committal (see O 45 r 3(1) of the RHC read with O 45 r 5(1) (a) of the RHC).

[69] Committal is an effective method of enforcement because it may lead to punishment by way of an imprisonment or a fine (*MBf Holdings Bhd & Anor v Houng Hai Kong & Ors* [1993] 2 MLJ 516). The process is quite simple. A person will be liable to committal if he is required by a judgment or order to do an act within a specific time and that person 'refuses or neglects' to do so within that specified period of time or where the person 'disobeys' a judgment or order requiring that person to abstain from doing an act. The specific time may be extended or abridged by virtue of O 45 r 5(1)(a) of the RHC and O 3 r 5 of the RHC. If a third party gets involved he too may be liable for contempt especially when he conspires with the defendant to breach the court order or if he actively obstructs the course of justice (*Z v A-Z & AA-LL* [1982] QB 558).

[70] The court in *Cartier International v Lee Hock Lee* [1993] 1 SLR 616 jailed the defendant there for six months for disobeying an order restraining him for breaching the plaintiff's copyright. Jail sentences were also meted out by the court in *William Jacks & Co (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Anor* [1994] 3 MLJ 40.

Order accordingly.

Reported by Sally Kee